

4 February 2010

BY EMAIL

Richard Chadwick
General Manager
Adjudications Branch
Australian Competition and Consumer Commission
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Dear Mr Chadwick

**Exclusive dealing notification N94403 lodged by Specialist Oncology
Property Limited**

We refer to your letter of 11 January 2010, asking Pharmatel Fresenius Kabi Pty Limited questions about the arrangements proposed in the exclusive dealing notification lodged by Specialist Oncology Property Ltd (**SOP**) on 30 December 2010 (the **Notification**).

Please note that as of 1 January 2010 Pharmatel Fresenius Kabi Pty Limited has changed its name to Fresenius Kabi Australia Pty Limited (**FKA**).

FKA's responses to your questions are outlined below.

1. *Which oncology clinics and/or hospitals do you currently supply chemotherapy drugs to? Please include the location of the hospital.*
 - 1.1 This is confidential commercial information and FKA declines to provide it publicly.
2. *Who are your competitors in the supply of chemotherapy drugs to oncology clinics / hospitals?*
 - 2.1 Please refer to Attachment 1 below.
3. *Please describe arrangements by which chemotherapy drugs are supplied to oncology clinics and/or hospitals. How do oncology clinics / hospitals select their supplier(s) of chemotherapy drugs? Are arrangements tying lease agreements to the supply of chemotherapy drugs common place? Are exclusive arrangements for the supply of chemotherapy drugs to oncology clinics / hospitals common place?*

- 3.1 Oncology clinics and hospitals generally select supplier(s) of chemotherapy drugs to enter into supply agreements by way of competitive tender process.
- 3.2 FKA is a major supplier of chemotherapy drugs in all regions of Australia and is generally invited to tender for such supply agreements. Although it would have expected to be included, no tender was sought from FKA by SOP and accordingly FKA did not participate in the competitive tender process by which SOP granted exclusive rights to McBeaths under the Agreement (as that term is understood in the Notification). FKA is not aware of any concerns with its products or services on the part of the group of oncologists behind SOP which would have led to its exclusion from the competitive tender process.
- 3.3 Exclusive arrangements between suppliers on one hand and hospitals and oncology clinics on the other for the supply of chemotherapy drugs are common place. It is important for oncology clinics and hospitals to have a stable supplier of chemotherapy drugs because of the particular importance of quality and reliability in that area of medicine. Accordingly, sole supplier arrangements which are periodically put to tender are in operation in relation to many oncology clinics and hospitals.
- 3.4 In contrast, however, FKA is not aware of any other arrangements by which a group of doctors (in this case forming SOP as the lessor) have tied a lease agreement to a requirement that the lessee clinic exclusively acquire a particular supplier's chemotherapy drugs.
- 3.5 FKA has some concerns that permitting such a structure may not be to the public benefit. Legislation requires prescribing doctors to maintain independence from suppliers of pharmaceuticals and other health services and products. For example, in NSW section 112B of the *Medical Practice Act 1992 (NSW)* prohibits a person (the offeror) from offering or giving a medical practitioner (or the employer of a registered medical practitioner) a benefit as inducement, consideration or reward for the medical practitioner:
 - (a) referring another person to the offeror;
 - (b) recommending to another person that the other person use any health service provided by the offeror or consult with the offeror in relation to a health matter; or
 - (c) recommending to another person that the other person use any health product supplied by the offeror.
- 3.6 As noted above, FKA understands that SOP (and its related services company, Specialist Oncology Services Pty Ltd) is a company formed by oncologists. Although SOP is presumably not itself a prescribing doctor, and we assume not the employer of prescribing doctors, FKA is concerned about the perception that might arise based on the lack of transparency associated with the Agreement between SOP and McBeaths. While we certainly do not suggest any breach of the Act or any other Act, there is a

lack of transparency in the Notification about the relationship between SOP and McBeaths.

- 3.7 FKA submits that great care is required in assessing whether a structure such as that proposed by the Notification is in the public interest.
- 3.8 FKA further observes that unlike typical exclusive supply agreements the proposed tying of exclusive supply agreements to lease arrangements means that the term of exclusivity is that typical of a lease. A five year exclusive term with an option for renewal for another five years is a longer exclusive supply period than is usual in the industry.
4. *Further information helpful to the Commission's assessment.*
 - 4.1 For completeness, FKA notes that a number of the public benefits claimed to arise as a result of the proposed arrangements are benefits that are likely to arise as a result of any chemotherapy drug supply agreement, or are otherwise not significant.
 - 4.2 For example, FKA does not agree that the location of the plant in the same suburb as the clinic will be significant in ensuring an efficient, consistent and ongoing supply of chemotherapy drugs to the Unit. Generally, chemotherapy drugs are ordered at least one full day in advance of treatment, ensuring adequate time for preparation of chemotherapy, and timely delivery to the clinic on the morning of treatment for patient administration. Similarly, there is little need for administration and clinical support services to be located in the vicinity as most communication can be effectively done remotely and any supplier would arrange for personal visits if required.
 - 4.3 In addition, FKA does not see the need for a full time oncology trained pharmacist to be based at the unit because the provision of clinical services is generally related to the checking of prescriptions and patient records to ensure accuracy in line with the prescribed treatment regimen. In any case most large suppliers, including FKA, would offer on-site pharmacist support to hospitals and oncology clinics if required.
 - 4.4 FKA provides in-services to clinic staff on subjects tailored to the customers' needs. This is a service we have been providing for many years, and is seen as being of significant value to customers, especially smaller clinics that may not have the resources of larger hospitals.
 - 4.5 TGA registered facilities of the kind operated by FKA and Baxter Healthcare Pty Limited commonly prepare chemotherapy drugs which are used in clinical trials. This service is often requested by hospitals that manage patients enrolled in clinical trials. Notably, this service should only be provided by an entity that has a TGA registered facility.
 - 4.6 As a final point, we have some concerns in relation to SOP's characterisation of the market affected by the proposed arrangements. In particular, SOP defines the relevant market as the market for oncology drugs for chemotherapy to clinics in Australia. We note that this assertion is seemingly contradicted by other statements made in the Notification,

including that the location of McBeaths' proposed production plant in the same suburb as the clinic will benefit the public by ensuring an efficient, consistent and ongoing supply of chemotherapy drugs to the Unit. In FKA's view, due to factors such as the short shelf life of such drugs, it is more likely that the relevant market for oncology drugs for clinics is geographically more narrow and limited to the Sydney region or New South Wales. We note that the impact of the proposed arrangement on the market may therefore be understated to some extent in the Notification.

We hope this is of assistance. Please feel free to contact Peter Fairfield (telephone 02 9391 5544) or the undersigned if you require any further information or would like to discuss the issues outlined above in more detail.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nicolas Shortis', with a long horizontal flourish extending to the right.

Nicolas Shortis
Managing Director

Attachment 1: Competitors

Owner	Trading As	Address	State
Baxter International Inc	Baxter Healthcare Pty Ltd	One Baxter Drive, Old Toongabbie, NSW, 2146	NSW
Peter Stewart McBeath and Adrian Phillip Wilson	McBeath's Pharmacy Westmead	161 Hawesbury Road, Westmead, NSW, 2145	NSW
Mark Tudehope	North Shore Private Hospital Pharmacy	Shop 1 Nth Shore Private Hosp Westbourne Street, St Leonards, NSW, 2065	NSW
John Constant	Base Hospital Pharmacy Port Macquarie	Wrights Road, Port Macquarie, NSW, 2444	NSW
Tom Ryan, Stuart Giles, Cathy Reid	APHS Pty Ltd	6 Dividend Street, Mansfield, QLD, 4122	QLD
Peter Brand and David Brand	The Wesley Pharmacy	Level 2, Sandford Jackson Building, 30 Chasely Street, Auchenflower, QLD, 4066	QLD
Bruce Heal & Partners	HPS Pharmacies Norwest & HPS Pharmacies Randwick	Level 1, 5 Greenhill Road, Wayville, SA, 5035	SA
Graham Slade, David Slade	Slade Pharmacy	Bridge Road, Richmond, 3121, VIC	VIC